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No. 04-04 166

IN THE

Supreme Court of the United States

FRED LOVELL, *et al.*,
Petitioners,

v.

JOSEPH S. COCHRAN, *et al.*,
Respondents.

On Appeal from the United States Court of Appeals for the Third Circuit

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PETITION FOR CERTIORARI OF FRED LOVELL, *et al.*

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QUESTION PRESENTED

1. Whether the Dairy Promotion and Stabilization Act of 1983 (Dairy Act), 7 U.S.C. §§ 4501-4514 (2004), and the Dairy Promotion and Stabilization Order (Dairy Order), 7 C.F.R. pt. 1150, violate the First Amendment by requiring dairy producers, in connection with a comprehensive regulatory scheme, to pay assessments to fund generic advertising promoting milk and other dairy products.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners in this case are Fred Lovell, Lee Greenwalt, Jackie Root, Earnest Norman, Stephen Marshall, Cecil Moyer, and James Vanblarcom.

This case arises out of an appeal to the U.S. Court of Appeals for the Third Circuit by Joseph S. Cochran and Brenda S. Cochran. *Cochran v. Veneman*, No. 03-2522. The Cochrans appealed to the Third Circuit from a decision of the U.S. District Court for the Middle District of Pennsylvania that had rejected their First Amendment claims on cross-motions for summary judgment. *Cochran v. Veneman*, No. 4:CV-02-0529. Petitioners, having intervened in the District Court, were appellees in *Cochran v. Veneman*, No. 03-2522, in the Third Circuit along with Ann Veneman (in her official capacity as Secretary of Agriculture), the United States Department of Agriculture, and the Dairy Promotion and Research Board.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Fred Lovell, Lee Greewalt, Jackie Root, Earnest Norman, Stephen Marshall, Cecil Moyer, and James Vanblarcom, by counsel, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-29a) is reported at 359 F.3d 263. The opinion of the district court (App. 30a-46a) is reported at 252 F.Supp.2d 126.

JURISDICTION

The judgment of the court of appeals was entered on February 24, 2004. Petitions for rehearing were denied on May 3, 2004(App. 47a-48a). This Court's jurisdiction is invoked under 28 U.S.C § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

1. The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law * * * abridging the freedom of speech.

2. The Dairy Promotion and Stabilization Act of 1983, 7 U.S.C. §§ 4501-4514, is reproduced at App. 49a-67a.

3. The Dairy Promotion and Stabilization Order, 7 C.F.R. pt. 1150, is reproduced at App. 68a-90a.

STATEMENT

1. This case presents a First Amendment challenge to the Dairy Promotion and Stabilization Act of 1983 (Dairy Act), 7 U.S.C. §§ 4501-4514, which requires domestic dairy producers to pay assessments to fund generic advertising and

promotion, research, and nutrition education programs conducted under the extensive supervision and oversight of the Secretary of Agriculture.[1] The Dairy Act is a part of the comprehensive regulation of the Nation's dairy industry that sets minimum prices for most raw milk produced in the Nation and regulates most of the distribution of raw milk in the Nation.

This Court recently granted certiorari to review the First Amendment analysis concerning a similar program funding generic promotions of beef. *Veneman v. Livestock Marketing Association*, 335 F.3d 711 (3d Cir. 2003), cert. granted, (May 24, 2004). *Livestock Marketing* presents two of the three issues presented here, i.e., (1) government speech and (2) the application of an intermediate scrutiny test for the compelled funding of commercial speech. Petitioners respectfully request that this Court grant this petition and hold this case pending this Court's resolution of *Livestock Marketing*. If the Eighth Circuit's decision in *Livestock Marketing* is affirmed by this Court, Petitioners respectfully request that this Court then schedule this case for briefing and oral argument.

A. In 2002, Respondents Joseph and Brenda Cochran brought suit against the Secretary of Agriculture to obtain a declaration that the Dairy Act violated the Cochrans' First Amendment rights of free speech and free association. Petitioners, dairy producers who support the Dairy Act promotion program, intervened to defend the law. The District Court, on cross-motions for summary judgment, granted the summary judgment motions of the government and Petitioners, holding that the Dairy Act was part and parcel of the comprehensive regulatory scheme applicable to the marketing of dairy products. App. 41a-42a.

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[1] A 2002 Amendment required, for the first time, that the assessment be collected on imported dairy products. 7 U.S.C. §§ 4501-4514 (2004), amended May 13, 2002, P.L. 107-171, Title I, Subtitle E, § 1505(h)(1), 116 Stat. 210.

B. On appeal, the Third Circuit reversed, holding that the Dairy Act violated the First Amendment rights of the Respondents. In doing so, the Third Circuit rejected the argument that the generic promotion program funded by Dairy Act assessments produced "government speech" immune from First Amendment scrutiny.

C. The Third Circuit also rejected the argument that Respondents' First Amendment claim was controlled by this Court's decision in *Glickman v. Wileman*, 521 U.S. 457 (1997), because the Dairy Act is ancillary to the comprehensive regulation of the dairy industry that has displaced many aspects of individual business activity of dairy producers.

In *Glickman v. Wileman,* 521 U.S. at 469, this Court rejected a First Amendment challenge to two California tree fruit marketing orders by explaining that "California nectarines and peaches are marketed pursuant to detailed marketing orders that have displaced may aspects of independent business activity." This Court there noted that nectarine and peach producers who are "compelled to fund the generic advertising at issue in this litigation do so as part of a broader collective enterprise in which their freedom to act independently is already constrained by the regulatory scheme." *Id.* This Court ruled that the advertising of California tree fruit was germane to the broader regulatory scheme for those commodities and that, in any event, the marketing orders did not fund ideological activities. *Id.* at 473. *See Keller v. State Bar of Cal.*, 496 U.S. 1 (1990); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

In contrast, the Third Circuit ruled that the Dairy Act violated the First Amendment because, it concluded, the Dairy Act is not ancillary to a broader regulatory scheme. It said, "[The Dairy Act] is not ancillary to any collective enterprise or compelled association with a non-speech purpose because there is no such enterprise or association for

milk that encompasses all dairy producers." App. 18a-19a (emphasis added).

Even though more than 96% of the raw milk sold in the United States is priced under federal or state milk marketing orders, and even though 75% of all milk marketed in the Nation is processed by handlers regulated by federal milk marketing orders, and even though the USDA purchases dairy products to fulfill its statutory obligation under the Agricultural Act of 1949, 7 U.S.C. § 1446, to maintain a floor under milk prices, the Third Circuit nevertheless ruled that the Dairy Act was not ancillary to a broader statutory scheme in which milk producers' "freedom to act independently is already constrained by the regulatory scheme." *See Glickman v. Wileman*, 521 U.S. at 469.

Rather, the Third Circuit ruled that this case was governed by *United States v. United Foods*, 533 U.S. 405 (2001). In *United Foods* this Court ruled that the use of assessments to fund generic advertising under the Mushroom Act, 7 U.S.C. §§ 6101 6112 (2004), violated the First Amendment because the program was "not part of some broader regulatory scheme." 533 U.S. at 415. In ruling that *United Foods* governed the result in this case, the Third Circuit stated that "[t]he Dairy Act is a stand-alone law that was not passed as part of any other federal dairy regulatory scheme". App. 9a; *Cochran*, 359 F.3d at 270. It noted, "In addition to the Dairy Act, the dairy industry is subject to a patchwork of federal and state regulatory laws." *Id.* Finding the *Glickman* rule inapplicable, it concluded, "The provisions of the Dairy Act do not require milk producers to participate in a collective enterprise and do not compel them to market their product, fluid milk, according to any rules of a cooperative." *Id.* at 275.

In contrast, following on the heels of this Court's 1997 *Glickman* decision but prior to its 2001 ruling in *United Foods*, two other circuits ruled that the Dairy Act did not violate the First Amendment because its advertising program was ancil-

lary to a broader regulatory scheme. *Nature's Dairy v. Glickman*, No. 98-1-73, 1999 WL 137631 (6th Cir. Mar. 2, 1999), 173 F.3d 429 (table), *cert. denied*, 528 U.S. 1074 (2000); *Gallo Cattle Co. v. California Milk Advisory Board*, 185 F.3d 969 (9th Cir. 1999) ("Gallo I"); *Gallo Cattle Co. v. USDA*, No. 98-17318, 1999 WL 547427 (9th Cir. July 27, 1999), 189 F.3d 473 (Table) ("Gallo II").

D. The Third Circuit also rejected Petitioners' argument that the Dairy Act satisfied the intermediate scrutiny test for commercial speech regulations set forth in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980). The Third Circuit noted that in addition to the government's interest in increasing demand for dairy products generally, the government had also argued that it "has a substantial interest in decreasing its obligation under the dairy price support program . . . ." App. 25a; *Cochran*, 359 F.3d at 279. The Third Circuit rejected this argument, however, noting that "the Dairy Act does not operate in conjunction with the price support program" and that "reductions in the government's obligations under the price support program are insignificant to the Dairy Promotion Program's existence, as whether the compelled assessments continue is controlled by the dairy producers via the referendum process." *Id.*

Seeming to confuse unprocessed, raw milk with processed fluid milk, the Third Circuit suggested that "producers of liquid milk such as the Cochrans are not covered by the price support program." *Id.* All raw milk sold by producers is, of course, liquid milk. Producers sell what cows produce—raw milk. That the government purchases shelf stable milk powder, cheese, and butter rather than processed fluid milk under the price support program, however, is not to say that the milk price support purchases support only the prices of those processed commodities. In fact, the milk price support program supports all raw milk prices (including the raw milk

sold by the Cochrans), because it is that raw milk that is utilized in making each of the processed, shelf-stable products that the government purchases. No matter to what ultimate purpose the Cochran's raw milk is put, the demand for that raw milk is increased by the government's entry into the marketplace to purchase various products made from raw milk.

The Third Circuit concluded that the government's interest in promoting the dairy industry is "not sufficiently substantial" to justify the infringement of the Cochran's First Amendment free speech and association rights," noting that the "Dairy Act seem[s] to really be special interest legislation more than the government's." App. 25a-26a; *Cochran*, 357 F.3d at 279. Yet, the Third Circuit offers no benchmark or test for making this important determination. It would seem that all legislation that passes Congress is of special interest to one set of citizens or another. For example, an Energy Bill is legislation in which energy companies have a "special interest." A Communications Bill is legislation in which local, long distance, and wireless companies have a "special interest." A Transportation Safety Bill is legislation in which airlines, common carriers, railroads, and trucking companies have a "special interest." To label the Dairy Act as "special interest" legislation and thereby conclude that it fails to satisfy *Central Hudson* creates a dangerous and unprincipled standard that merits review by this court.

In contrast, the Third Circuit has previously found the federal government's interest in the promotion of beef consumption to be not merely a substantial government interest, but a compelling one. *United States v. Frame*, 885 F.2d 1119, 1133-1137 (3rd Cir. 1989), *cert. denied* 493 U.S. 1094 (1990) (the Third Circuit ruled that assisting the beef industry to maintain and increase demand for beef in the context of the Beef Promotion Act was a compelling government interest).

2. The extensive regulation of the marketing of milk and other dairy products in the United States brings this case within this Court's decision in *Glickman*. The Third Circuit's decision creates a conflict with the Sixth Circuit's decision in *Nature's Dairy* and with the Ninth Circuit's decisions in *Gallo I* and *Gallo II*.

3. In 1949, Congress enacted a federal price support program for milk. 7 U.S.C. § 1446. Congress authorized the Secretary of Agriculture to purchase butter, cheese, and milk powder in order to support domestic milk prices. S. Rep. No. 98 163 at 12-13, reprinted in 1983 U.S.C.C.A.N. 1658, 1669 70; App. 92a. The price support program puts a floor under the price of manufacturing milk and maintains a floor under all milk prices. *Id.* By 1983, the price support program had fulfilled its statutory goals, but had also caused milk production to outpace demand. By 1984, nearly 20 billion pounds of dairy surplus existed, which required the government to maintain warehouses containing huge stores of surplus dairy products. App. 103a.

4. In response, Congress passed the Dairy Act in 1983 to reduce the surplus of dairy products the government was required to buy and store under the milk price support program. Because "dairy products are a valuable part of the human diet," because "the production of dairy products plays a significant role in the Nation's economy," and because "the maintenance and expansion of existing markets for dairy products are vital to * * * the general economy of the Nation," Congress enacted the Dairy Act to "strengthen the dairy industry's position in the marketplace" through, among other things, a "coordinated program of promotion." 7 U.S.C. § 4501(a),(b); App. 49a-50a.

The Dairy Act requires dairy producers to pay an assessment of 15 cents per hundredweight of milk sold in the United States to fund research, nutrition education, and promotional activities. To achieve these substantial government

objectives, Congress created the National Dairy Board ("Dairy Board") to operate under the direct supervision and control of the Secretary of Agriculture. 7 U.S.C. § 4504(b)(1); App. 53a; 7 C.F.R. § 1150.131(a); App. 71a.

The Dairy Act directs the Secretary of Agriculture to promulgate a "dairy products promotion and research order." 7 U.S.C. § 4503(a); App. 51a-52a. The Secretary issued such a Dairy Order in March 1984. 7 C.F.R. pt. 1150; App. 68a. The Order provides for the establishment of the Dairy Board to administer the Dairy Program under the Secretary's extensive oversight and supervision. 7 U.S.C. § 4504(b)-(f), (h)-(i); App. 53a-56a, 58a. The Secretary appoints all 36 members of the Dairy Board from nominations she receives from eligible dairy producer organizations that meet the Secretary's requirements and have been certified by the Secretary as meeting those requirements. 7 U.S.C. § 4504(b); App. 53a.

The Act provides that the Board shall "administer the order in accordance with its terms and provision[s]," 7 U.S.C. § 4504(c)(2); App. 54a-55a. The Act provides that the Board shall have the power to "develop . . . plans or projects to promote the use of fluid milk and dairy products as well as projects for research and nutrition education and to make recommendations to the Secretary regarding such proposals." 7 U.S.C. § 4504(c)(1); App. 54a-55a. All such plans and projects must be "approved by the Secretary before becoming effective." 7 U.S.C. § 4504(d); App. 55a; 7 C.F.R. § 1150.140(e); App. 77a. The Secretary must also approve the budget of the Dairy Board and any contract or agreement through which the Board seeks to develop or implement any of its plans or projects. 7 U.S.C. § 4504(e)-(f); App. 55a-56a; *see* 7 C.F.R. § 1150.140(g)-(i); App. 77a-78a. The Act also provides, "There are hereby authorized to be appropriated such funds as are necessary to carry out the provisions of this subtitle." 7 U.S.C. § 4513; App. 66a. This section also

provides that no appropriated funds shall pay the expenses of the Dairy Board itself. *Id.*

5. Under the Agricultural Marketing Agreement Act of 1937, federal milk marketing orders regulate the marketing of milk in much of the country. 7 U.S.C. § 608c(1),(2); App. 104a. Eleven federal milk marketing orders cover most of the contiguous 48 states. App. 104a. The marketing of milk is extensively regulated by federal milk marketing orders, expressly exempt from antitrust laws, and milk marketing orders displace competition in the markets to which they apply. App. 99a.

To prevent competition among farmers seeking to sell their raw milk for higher-valued fluid milk use, all farmers who sell their milk to federal order regulated processors are paid a "blended" price for all their milk. Federal milk marketing orders classify milk according to its ultimate use and "*establish[ ] minimum prices for fluid grade milk in most parts of the country.*" S. Rep. No. 98-163 at 13; App. 99a (emphasis added).

Handlers regulated under federal marketing orders process approximately 75% of all milk marketed in the United States. App. 104a, 108a. State milk marketing orders cover most areas not covered by federal orders. App. 110a-111a. More than 96% of all raw milk sold in the United States is priced under a federal or state milk marketing order. *Id.* Respondents live in an area that is covered by a Pennsylvania state milk marketing order. Respondents have sold their milk to a processor governed by a federal milk marketing order. *Id.*

6. In 1994, the Dairy Board and the United Dairy Industry Association ("UDIA"), a federation of qualified state and regional dairy promotion, research, or nutrition education programs, created Dairy Management, Inc. ("DMI"). App. 100a. DMI is a separate entity created by the merger of the staffs of the Dairy Board and UDIA to form a single staff that serves both organizations. App. 100a-101a.

7. Pursuant to the USDA's "Guidelines for AMS Oversight Of Commodity Research and Promotion Programs," all advertising of the Dairy Board or DMI must be approved in advance by the Agricultural Marketing Service ("AMS") of the USDA. App. 118a; App. 124a-125a. Advertising has been altered by DMI, on a consistent basis, to respond to the objections of the Dairy Programs Division of USDA. App. 125a. No advertising to which the Dairy Programs Division has objected has been used until those objections have been addressed. *Id.*

In 1998 DMI requested the Dairy Programs' approval of a television commercial entitled "Paws" that involved a "milk-deprived grandmother" being forced to give her cat non-dairy creamer instead of milk. App. 102a, 125a. Dairy Programs rejected the ad because it believed it was disparaging to soybeans. *Id.* After DMI and others responded to the concerns raised by Dairy Programs, Dairy Programs approved the commercial with the caveat that if there was opposition, it would be taken off the air. App. 102a-103a, 128a-137a.

The Dairy Board is required to maintain books and records as the Secretary may require, and is required to make them available to the Secretary for inspection and audit, as the Secretary may prescribe. 7 U.S.C. § 4504(h); App. 58a. The Board is required to provide the Secretary with all information the Secretary requests and is required to give the Secretary notice of their meetings so that the Secretary or her representative may attend. 7 C.F.R. § 1150.140 (l)-(m); App. 78a-79a.

The promotion and research activities of the Dairy Board are funded by assessments paid by producers. 7 C.F.R. § 1150.152 (a),(b); App. 79a. Each producer of milk marketed commercially in the 48 contiguous states is required to pay an assessment of fifteen cents per hundredweight to the Dairy Board. *Id.* A producer who contributes to a State or regional dairy promotion, research, or nutrition education

program certified by the Secretary as a "Qualified Program" is entitled to a credit of up to ten cents per hundredweight against the amount that would otherwise be owed to the Dairy Board. 7 C.F.R. § 1150.152(c); App. 80a; 1150.153(a); App. 81a.

The Act and Order prohibit the use of assessments collected by the Board for the purpose of "influencing governmental policy or action," except for making recommendations to the Secretary for an amendment to the Dairy Order. 7 U.S.C. § 4504(j); App. 58a; 7 C.F.R. § 1150.154; App. 84a.[2] All patents, copyrights, inventions, or publications developed through the use of Dairy Act funds become "the property of the U.S. Government as represented by the [Dairy] Board." 7 C.F.R. § 1150.184; App. 89a.

8. The Capper-Volstead Act permits dairymen to join together into cooperatives to process, prepare, and market their products without fear of prosecution under the antitrust laws. 7 U.S.C. § 291; App. 98a-99a. Dairy cooperatives established under Capper-Volstead may legally fix the prices at which their members' products may be sold. S. Rep. No. 98-163 at 13; App. 99a. In 1997, the Nation's 226 dairy cooperatives marketed 127.4 billion pounds of milk, or 83% of all the milk sold in the United States, to plants and dealers. App. 104a, App. 138a 139a.

9. U.S. law imposes tariffs and quotas, on the importation of milk, cheese, and other dairy products into the United States. 19 U.S.C. § 1202; App. 99a-100a. The purpose of these import controls is to "protect the price support system

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[2] Such restrictions are common when the government employs funds to implement governmental policies or programs. *See, e.g.*, Energy and Water Development Appropriations Act of 2002, Pub. L. No. 107-66, 115 Stat. 486, 504 (prohibiting use of funds made available under Act "to influence legislative action on any matter pending before Congress or a State legislature").

and keep the U.S. Government from supporting world milk prices." S. Rep. No. 98-163 at 13; App. 100a.

REASONS FOR GRANTING THE PETITION

The Third Circuit has held unconstitutional an Act of Congress that is part of a long-standing and comprehensive federal regulatory scheme that limits the marketing autonomy of individual milk producers in this country. The judgment of the Third Circuit is incorrect and merits review by this Court.

Respondents' claim does not raise a First Amendment issue for the courts to resolve because the Dairy Act is an economic policy that the Congress is free to adopt with only limited scrutiny from the courts. The Dairy Act was enacted to reduce a 20 billion pound surplus of dairy products purchased and stored by the federal government pursuant to the milk price support program. It was also enacted to protect the livelihood of dairy producers and others in the dairy industry, to provide nutrition education to consumers, and to strengthen the Nation's economy. As such, it is not a law "abridging the freedom of speech" but rather is a law that promotes speech—government speech. That government speech is funded by a modest assessment paid by persons who voluntarily participate in the dairy industry. Even if the speech is deemed commercial, rather then government, speech, the Dairy Act directly advances a substantial government interest in a well-tailored manner, and as such does not violate the First Amendment.

Whether analyzed under the First Amendment standard applied to economic regulation, government speech, or commercial speech, the Dairy Act does not abridge Respondents' freedom of speech or association. In holding that *Glickman* does not apply, the Third Circuit's judgment directly conflicts with decisions of the Sixth and Ninth Circuits. In also holding that the Dairy Act does not produce government speech, the Third Circuit's decision threatens the government's ability to decide how it funds its own speech. In holding that government

interest in the Dairy Act is not substantial under the commercial speech test, the Third Circuit has rendered a decision that cannot be reconciled with its prior holding in *United States v. Frame*, *supra*, where it held that the government interest in beef promotion was a compelling government interest.

This Court should review the Third Circuit's exercise of the "grave power of annulling an Act of Congress." *United States v. Gainey*, 380 U.S. 63, 65 (1965).

I. THE THIRD CIRCUIT'S JUDGMENT CONFLICTS WITH THE DECISIONS OF TWO OTHER CIRCUITS THAT HAVE CORRECTLY DECIDED THAT COMPREHENSIVE REGULATION OF MILK MARKETING RENDERS THE DAIRY ACT'S ASSESSMENT FOR GENERIC PROMOTION CONSTITUTIONAL

Because the generic advertising component of the Dairy Act is ancillary to the comprehensive regulation of the sale and production of milk in the United States, this case is controlled by *Glickman*. The promotion component of the Dairy Act is only one aspect of the comprehensive regulation of milk production and marketing that "establish and maintain orderly marketing conditions and fair prices" for milk. *See Glickman v. Wileman*, 521 U.S. at 461. Because the promotion component is "the logical concomitant of a valid scheme of economic regulation," *United Foods*, 533 U.S. at 412, the Dairy Act does not violate the First Amendment.

In 1999, the Sixth Circuit ruled that the Dairy Act does not violate the First Amendment. *Nature's Dairy v. Glickman*, *supra*. In *Nature's Dairy*, the Sixth Circuit ruled that "the Dairy Promotion Program, similar to the [tree fruit] program in [*Glickman v. Wileman*], is part and parcel of a legitimate regulatory scheme for promotion of commodities . . . . The advertising campaign funded by the Dairy Act is designed to stimulate consumer demand for a highly regulated product." *Id.* at 3. The Sixth Circuit noted that "while appellants

vigorously object to the mandatory provisions of the Dairy Act, in the absence of constitutional infirmity, this Court must defer to the judgment of Congress." *Id.* In *Nature's Dairy*, a group of Michigan dairy producers brought an action seeking a declaration that the Dairy Act violated their First Amendment rights. The district court rejected plaintiffs' claims and granted summary judgment in favor of the government. In addressing the question of "whether being compelled to fund this advertising raises a First Amendment issue" or "whether it is simply a question of economic policy for Congress and the Executive to resolve," the Sixth Circuit applied *Glickman*. *Id.*

In *Nature's Dairy*, the challengers urged the Sixth Circuit to distinguish *Glickman* from their case on the basis that "the challenged provisions create a stand-alone program." Specifically, the challengers argued that *Glickman* "involved a provision of a comprehensive marketing order of which the advertising portion was but one part." *Id.* The Sixth Circuit, rejecting this argument, noted that the district court "found the Dairy Promotion Program similar to the program in *Glickman*" and that the Dairy Promotion Program "is part and parcel of a legitimate regulatory scheme for promotion of commodities." *Id.* The Sixth Circuit noted that "federal regulation has permeated the dairy industry for more than fifty years" and that "for decades, the federal government has operated a dairy price support program which was so successful that by the 1980's milk production outpaced demand, requiring the government to buy increasingly larger quantities of dairy products." *Id.* (citing S. Rep. No. 98-163 at 14-15).

The Sixth Circuit affirmed the District Court's analysis and held:

> The Dairy Act does not impose any restraint upon a producer from communicating any message to any audience. No producer is required to engage in actual or symbolic speech. The advertising at issue promotes only

> the consumption of dairy products and does not identify individual financial sponsors. Finally, the advertising program does not compel any producer to endorse or fund any political or ideological view.

Id.

The Ninth Circuit agreed. In *Gallo I*, the Ninth Circuit rejected Gallo's First Amendment challenge to the California state analogue to the Dairy Act. In that case, relying on *Glickman*, the Ninth Circuit held, "The [California State] Milk Marketing Order is a species of economic regulation that does not abridge Gallo's First Amendment rights." 185 F.3d at 977. The Ninth Circuit determined that California milk producers were subject to extensive economic regulation, noting that "[plaintiff] Gallo admits that the California milk producers are regulated to the same extent as, if not more than, the tree fruit growers in [*Glickman v. Wileman*]." 185 F.3d at 974. In light of this, the Ninth Circuit rejected Gallo's First Amendment claims with respect to the California Milk Marketing Order.

The Ninth Circuit adopted the same rationale in rejecting Gallo's First Amendment challenge to the Dairy Act in *Gallo II*. In making its decision that the Dairy Act was constitutional under *Glickman*, the Ninth Circuit stated that "[t]he advertising program here is *indistinguishable in all relevant aspects* from the programs held constitutional by the Supreme Court in [*Glickman*] and by this court in *Gallo I*." *Gallo II* at 1. (Emphasis added.)

Following its analysis in *Gallo I*, in *Gallo II* the Ninth Circuit ruled that under the Dairy Act dairy farmers are compelled to fund generic advertising for fluid milk and dairy products "as part of a broader collective enterprise in which their freedom to act independently is already constrained by the regulatory scheme." *Id.* (quoting *Gallo I*, 185 F.3d at 975 (quoting *Glickman v. Wileman*, 521 U.S. at 469)). The Ninth Circuit further concluded that the Dairy Promotion Program

of the Dairy Act "does not impose a restraint on Gallo's freedom to communicate," does not "compel Gallo to engage in any actual or symbolic speech," and does not require Gallo to be "publicly associated with the generic advertising." *Id.*

The Third Circuit, relying on *United Foods*, concluded that *Glickman* was inapplicable because the Dairy Promotion Program is a so-called "stand-alone program" in which there is no comprehensive industry regulation as a component of the Dairy Act. *Cochran v. Veneman*, 359 F.3d at 270; App. 19a. Such a reading of *United Foods* is illogical. This Court's rationale in *United Foods* was based on the mushroom industry not being otherwise regulated; it was not based on the fact that the Mushroom Act did not otherwise regulate the mushroom industry.

Respondents have argued that this is irrelevant because they have chosen not to participate in a dairy cooperative and assert that they "can and often do" sell their milk to processors that are not regulated by federal milk marketing orders. Whether Respondents sell to processors regulated by a federal order or to Pennsylvania processors regulated by Pennsylvania's order, Respondents operate in a market environment that is comprehensively regulated at both the federal and state levels. Moreover, Respondents have no choice but to have their marketing autonomy dramatically limited the comprehensive regulation of the dairy industry. John Donne wrote that "[n]o man is an island, entire of itself; every man is a piece of the continent, a part of the main." This surely is the case with Respondents and their milk marketing activities. They do not operate in a vacuum and they cannot avoid being impacted by the milk marketing regulation that is pervasive in the United States. This Court's *Glickman* analysis looks at whether there is a broad regulatory scheme in which individual marketing autonomy is restrained. That aptly describes the marketing environment facing the Respondents.

The Dairy Act involves "questions of economic policy for Congress to resolve" and not a "First Amendment issue for the courts to resolve." *Glickman*, 521 U.S. at 468. The Dairy Act is "a species of economic regulation that should enjoy the same strong presumption of validity that we accord to other policy judgments made by Congress." *Id.* The Dairy Act does not violate the First Amendment. This Court should review the Third Circuit's judgment.

II. GENERIC ADVERTISING FUNDED BY THE DAIRY ACT PRODUCES GOVERNMENT SPEECH BECAUSE CONGRESS DECIDED ON THE MESSAGE, CREATED A GOVERNMENTAL ENTITY TO FORMULATE IT, AND VESTED ULTIMATE CONTROL OVER THE MESSAGE IN AN OFFICIAL WITH POLITICAL ACCOUNTABILITY—THE SECRETARY OF AGRICULTURE

"[W]hen [the government] is the speaker or when it enlists private entities to convey its message . . . it is entitled to say what it wishes." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995). Here the government has chosen to say "got milk?" to encourage the consumption of fluid milk and "Ahh, the power of Cheese" to encourage the consumption of cheese. If Respondents disagree with these government messages, their recourse is at the ballot box, not the courthouse. *Griffin v. Dep't of Veterans Affairs*, 288 F.3d 1309, 1324-25 (Fed. Cir.), *cert. denied*, 537 U.S. 947 (2002).

A. The Government Speech Doctrine

The First Amendment restricts the government's ability to prevent or restrain private speech. It does not prevent the government from contributing its own voice to the marketplace of ideas. Indeed, the government regularly speaks to promote particular objectives, such as to encourage people to join the armed forces, to conserve energy, or to stop smoking.

When it does so, it does not violate the First Amendment even though pacifists, power companies, or tobacco farmers disagree with the government's chosen messages. Just as the "Be All You Can Be" military recruiting campaign is government speech conveying the message that you should join the armed forces, the "got milk?" dairy advertising campaign is government speech.

In *Rust v. Sullivan*, 500 U.S. 173, 194-200 (1991) this Court upheld federal regulations prohibiting recipients of Title X funding from promoting or advocating abortion as a method of family planning. This Court later interpreted its holding in *Rust* as relying on the rationale that "the counseling activities of the doctors under Title X amounted to government speech" in that the government decided on the message and "disbursed public funds to private entities to convey a government message." *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001).

Where the government passes a law, a component of which is to publish a government message, where the government maintains final authority over the content of that message, and where the government bears ultimate responsibility for that message, the message—the speech—is that of the government, regardless of whether the particular messenger is a public or a private entity. *Cf. Griffin v. Dep't of Veterans Affairs*, 288 F.3d 1309, 1324 (Fed. Cir.), *cert. denied*, 597 U.S. 947 (2002)(ruling that when it speaks "[t]he government is entitled to full control over its own speech, whether it speaks with its own voice or enlists private parties to convey its message, and the remedy for dissatisfaction with its choices is political rather than judicial").

In *Downs v. Los Angeles Unified School District*, 228 F.3d 1003, 1012 (9th Cir. 2000), the "government speech" issue arose in the context of notices posted on high school bulletin boards. The Ninth Circuit decided that who controls the message determines whether the speech is government

speech. 228 F.3d at 1009-12. Because the school's principal controlled the messages posted on the school's bulletin boards, those messages constituted government speech even though there was no explicit statement on the bulletin boards that they contained official school messages. *Id.* at 1012. The Ninth Circuit thus suggests that the relevant inquiry is to focus on who controls the message.

In *Keller v. State Bar of California*, 496 U.S. 1, 12-13 (1990), this Court said:

> Government officials are expected as a part of the democratic process to represent and to espouse the views of a majority of their constituents. With countless advocates outside of the government seeking to influence its policy, it would be ironic if those charged with making governmental decisions were not free to speak for themselves in the process. If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed.

See also Lee v. Weisman, 505 U.S. 577, 591 (1992) ("the very object of some of our most important speech is to persuade the government to adopt an idea as its own").

Indeed, effective government would grind to a halt if every person had a right to insist that his money not be used to support programs or positions with which he disagrees. *See Block v. Meese*, 793 F.2d 1303, 1313 (D.C. Cir.), *cert. denied*, 478 U.S. 1021 (1986) (discussing the "practical problems of excluding the government from ideological debate"). As Justice Scalia has put it:

> It is the very business of government to favor and disfavor points of view on (in modern times, at least) innumerable subjects . . . . And it makes not a bit of difference, insofar as either common sense or the Constitution is concerned, whether [government] offic-

> ials further their (and, in a democracy, our) favored point of view by achieving it directly . . . ; or by advocating it officially . . . ; or by giving money to others who achieve or advocate it . . . . None of this has anything to do with abridging anyone's speech.

National Endowment for the Arts v. Finley, 524 U.S. 569, 598 (1999)(Scalia, J. concurring).

The First Amendment does not provide a legal basis for objecting to government speech. While the First Amendment prohibits the government from regulating the speech of others based on its content, this Court has "permitted the government to regulate the content of what is or is not expressed *when it is the speaker or when it enlists private entities to convey its own message*." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (emphasis added); *see Legal Servs. Corp. v. Velazquez*, 531 U.S. at (1995) ("viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker, or instances * * * in which the government used private speakers to transmit specific information pertaining to its own program") (citations and quotation omitted). As then-Judge Scalia said in *Block v. Meese*: "The short of the matter is that control of government expression * * * is no more practicable, and no more appealing, than control of political expression by anyone else. * * * [T]he guarantee of freedom of speech does not * * * prevent government from adding its own voice to the many that it must tolerate." 793 F.2d at 1314 (quotation omitted).

B. This Court Has Not Decided Whether The Government Speech Doctrine Applies To Commodity Promotion Laws

This Court in *United Foods* left unresolved the question of whether generic advertising conducted pursuant to a commodity promotion and research program is government speech and thus immune from First Amendment inquiry. 533

U.S. at 416-417. In *United Foods* this Court implicitly recognized the possible application of the government speech doctrine to such cases, while declining to address the government's argument that the generic advertising for mushrooms was govern-ment speech because the argument was not raised at the court of appeals. *See id.* at 416-417; *see also id.* at 428 (Breyer, J., dissenting) (noting that the majority's failure to address the issue left "uncertainty as to how much governmental involvement will produce a form of immunity under the 'government speech' doctrine"). Similarly, in *Glickman*, this Court did not consider the government speech argument because the government did not make the argument in that case, only an *amici* did. *See* 521 U.S. at 482 n. 2 (Souter, J., dissenting).

In *United Foods*, this Court said:

> The Government argues the advertising here is government speech, and so immune from the scrutiny we would otherwise apply. . . . The Government's failure to raise its argument in the Court of Appeals deprived respondent of the ability to address significant matters that might have been difficult points for the Government. For example, *although the Government asserts that advertising is subject to approval by the Secretary of Agriculture, respondent claims the approval pro forma.* This and other difficult issues would have to be addressed were the program to be labeled, and sustained, as government speech.

533 U.S. at 416-17 (emphasis added). The record below demonstrates that the Secretary's oversight of the Dairy Board and DMI is both real and vigorous.

C. Dairy Board Is The Government For First Amendment Purposes

To decide whether certain speech is government speech one must first determine who is doing the speaking. If the government is doing the speaking, then the speech is government speech. *Cf. Downs v. Los Angeles Unified School*

District, *supra*. This Court provided clear guidance on how to determine if the government is speaking in *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374 (1995), where it held that Amtrak is an arm of the government subject to the constraints of the First Amendment when it restricts private speech. Amtrak had refused to allow *Lebron* to display an advertisement with political overtones. The Court stated, "We hold that where, as here, the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the government for purposes of the First Amendment." *Id.* at 400.

The three factors that led this Court to conclude that Amtrak was "part of the Government for purposes of the First Amendment"—(1) creation of the entity by special law, (2) furtherance of governmental objectives, and (3) retention of appointment authority over the entity created—are all present here. Like Amtrak, the Dairy Board is "part of the Government for purposes of the First Amendment."

The Dairy Board satisfies the first factor because it was created by a special statute—the Dairy Act. The Dairy Board satisfies the second factor—being formed to further government objectives. The Dairy Board was created in 1983 to advance the declared policy of Congress "to strengthen the dairy industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for fluid milk and dairy products produced in the United States." 7 U.S.C. § 4501(b); App. 49a.

These "governmental objectives" (*Lebron*, 513 U.S. at 398) were reaffirmed with the passage of the Federal Agricultural Improvement and Reform Act of 1996, whereby Congress found that "[i]t is in the national public interest and vital to the welfare of the agricultural economy of the United States to maintain and expand existing markets and develop new

markets for agricultural commodities through industry-funded, Government-supervised, generic commodity promotion programs established under commodity promotion laws" such as the Dairy Act. 7 U.S.C. § 7401(b)(1). Congress specifically found that the Dairy Act and other commodity promotion laws operate "under the required supervision and oversight of the Secretary of Agriculture . . . [to] further specific national governmental goals, as established by Congress." 7 U.S.C. § 7401(b)(8). In short, the Dairy Act was enacted to advance substantial governmental objectives and the advertising it produces directly advances those governmental objectives established by Congress. *Id.*

As to the third *Lebron* factor—the Dairy Board satisfies this requirement because the Secretary of Agriculture appoints all members of the Dairy Board. 7 U.S.C. § 4504(b); App. 53a. The record below is replete with evidence of the active oversight and control over the Dairy Board and DMI exercised on essentially a daily basis by the Secretary of Agriculture's designee and other USDA employees. App. 124a-125a; 95a-96a; 101a-103a; 112a-123a; 126a-137a.

In addition, all "patents, copyrights, trademarks, inventions or publications developed through the use of funds collected under the provisions of [the Dairy Order] * * * *shall be the property of the U.S. Government as represented by the Board*, and shall . . . inure to the benefit of the Board." 7 C.F.R. § 1150.184; App. 89a (emphasis added). Moreover, as noted above, Congress authorized appropriations to "carryout and the provisions of the Dairy Act." 7 U.S.C. § 4513; App. 66a. This confirms that the Dairy Board is the government for First Amendment purposes and the speech it produces is government speech.

D. Even If Dairy Board Is Not The Government, It Produces Government Speech

Even if this Court were to conclude that the Dairy Board is not the government for First Amendment purposes, the advertising of the Dairy Board nevertheless constitutes government speech. When the Dairy Board speaks, its does so on behalf of the government. The content of Dairy Board advertising is determined by Congress, and brought to the marketplace under the active oversight and control of the USDA.

The government may enlist private entities "to convey a governmental message" or "transmit specific information pertaining to its own program" without implicating the First Amendment. *Rosenberger*, 515 U.S. at 833. In determining whether the speech activities at issue in *Keller* constituted government speech, this Court focused on the entity that conveyed the message—the California State Bar—and not on the nexus between the state bar's members and the messages to which they objected. Because this Court concluded that the California State Bar was not like a typical government agency or official, who "[is] expected as part of the democratic process to represent and espouse the views of the majority of [its] constituents," 496 U.S. at 12, and because the state legislature did not specify that the State Bar should favor gun control or nuclear freeze messages, it concluded that those messages were not government speech. *Id.* at 13-15.

This case is distinguishable from *Keller*. Here, unlike *Keller*, the message being conveyed—dairy promotion—was formed in the first instance by Congress "as part of the democratic process." 496 U.S. at 12. The Dairy Board was created by Congress with the express purpose of conveying that *particular* message to the public. It does so pursuant to precise government regulations set forth in the Dairy Order, 7 C.F.R. pt. 1150, and only under the extensive supervision,

oversight, and control of the Secretary of Agriculture, an official with full political accountability, and her designees.

In contrast, no such governmental control characterized the activities of the State Bar in *Keller*. The messages at issue there represented the views of a particular group—the Bar—on a wide and changing array of issues, such as endorsing gun control, a nuclear weapons freeze, and the like. 496 U.S. at 15. The Dairy Act prohibits the Dairy Board from conducting activities of an advocacy nature, 7 U.S.C. § 4504(j), and limits its permitted speech activities to commercial promotion and advertising. Here the message was established by the representative of the people—the Congress—and is implemented by the Secretary, a politically appointed official. The Dairy Act produces government speech.

E. The Source Of Funding Of Speech Does Not Change Its Character

Respondents have argued that in evaluating whether the Dairy Act's generic advertising scheme constitutes "government speech," one must take into account whether the speech is funded by general tax revenues or by targeted assessments paid by members of one group. This argument is misplaced. The key inquiry is whether the government is controlling the advertising messages produced by the Dairy Board. The District Court record contains substantial, unrebutted evidence that the Secretary exercises extensive oversight and control over all aspects of the Dairy Promotion Program, thus assuring that the Dairy Board's message is the government's message. App. 101a-103a; 112a-139a.

Furthermore, with respect to funding, it is within the purview of the Congress to decide how it chooses to fund its own speech—whether by means of general tax revenues or through a special assessment imposed on a smaller group of citizens. When the government imposes taxes, assessments, or exactions on all taxpayers or some smaller group to fund government speech, the speech remains government speech.

See Board of Regents of the Univ. of Wisc. Sys. v. Southworth, 529 U.S. 217, 229 (2000). As this Court has recognized, "The government, as a general rule, may support valid programs and policies by taxes *or other exactions* binding on protesting parties." *Id.* (emphasis added). It necessarily follows from this that the government may spend the money it raises to engage in "speech and other expression to advocate and defend its own policies." *Id.*; *see also Rosenberger*, 515 U.S. at 833 ("when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes"). While some may disagree with what the government has choosen to say, such a disagreement does not give those who disagree a First Amendment right to silence the government or excuse themselves from having to pay for the message.

In *Southworth*, a case concerning the constitutionality of a student activity fee that was used in part to fund organizations engaging in ideological speech, this Court noted that because "[t]he University ha[d] disclaimed that the speech is its own," the case did not present the question of whether the challenged program could be sustained as government speech. 529 U.S. at 229. This Court went on to note, however, that "[i]f the challenged speech here were financed by tuition dollars and the University and its officials were responsible for its content, the case might be evaluated on the premise that the government itself is the speaker." *Id.* This Court recognized that this would be government speech even though the source of funding was tuition dollars, not general tax revenues. The source of funding of the "government speech" was not a concern in *Southworth*, nor should it be a concern here. It remains the government's message no matter the source of funding. *R.J. Reynolds Tobacco Co. v. Bonta*, 272 F.Supp.2d 1085 (E.D.Cal. 2003), *appeal pending*, (9th Cir.)(holding that specialized tax assessed on wholesale tobacco sales to fund California's anti-tobacco advertising campaign produced government speech); *Charter v. USDA*,

230 F.Supp.2d 1121 (D. Mont. 2002), *appeal pending*, No. 02-36140 (9th Cir.)(Beef Act promotions constitute government speech).

Society frequently calls on its members to pay taxes, dues, or assessments to support various entities both governmental and nongovernmental and this Court has not suggested that the government speech doctrine applies only to speech funded with general tax revenues. No one thinks that everyone who makes such a payment thereby endorses the agenda of the recipient, because the connection between the payment of an individual's dues and the views to which he objects is factually so remote. *Lathrop v. Donohue*, 367 U.S. 820, 859 (1961) (Harlan, J., concurring in the judgment). As Justice Harlan said:

> What seems to me obvious is the large difference in degree between, on one hand, being compelled to raise one's hand and recite a belief as one's own, and, on the other, being compelled to contribute dues to [an organization] fund which is to be used in part to promote the expression of views in the name of the organization (not in the name of the dues payor), which views when adopted may turn out to be contrary to the views of the dues payor.

Id. at 858.

The facts of this case are a far cry from a case in which the government attempts to compel adherence to its own message by its citizens, as in *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), where students were faced with expulsion and prosecution for failing to participate in the Pledge of Allegiance, or *Wooley v. Maynard*, 430 U.S. 705 (1977), where motorists were required to bear *on their own vehicle license plates* an ideological state motto they found morally objectionable.

Respondents here face no such ideological imposition. The Dairy Act simply requires them to pay a fee to fund the

government message. It neither "compel[s] [them] to utter what is not in [their] mind[s]," *Barnette*, 319 U.S. at 634, nor makes them "the courier for [the government's] message." *Wooley*, 430 U.S. at 717. No one has asked Respondents to express their personal support for the generic promotion of dairy, similar to *Barnette*, or to place a "got milk?" bumper sticker on their cars, similar to *Wooley*. For the government to compel political or ideological speech from the lips of a reluctant citizen is worlds removed from compelling a citizen to contribute financially to support the government's pro-milk message spoken to the public by the government itself. *See NAACP v. Hunt*, 891 F.2d 1555, 1566 (11th Cir. 1990) ("Government communication is legitimate so long as the government does not abridge an individual's 'First Amendment right to avoid becoming the courier for such message.'") (quoting *Wooley*, 430 U.S. at 717).

III. THE ASSESSMENT PROVISIONS OF THE DAIRY ACT ARE CONSTITUTIONAL UNDER THE INTERMEDIATE SCRUTINY APPLICABLE TO REGULATIONS OF COMMERCIAL SPEECH

The Dairy Act's promotion program satisfies the *Central Hudson* commercial speech test by directly advancing a substantial government interest in a manner well tailored to minimize constitutional concerns.

The regulation of commercial speech is constitutional if it: (1) promotes a substantial government interest, (2) directly advances that interest, and (3) is no more extensive than necessary to serve that interest. *Central Hudson*, 447 U.S. at 566; *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 556-57 (2001). The Dairy Act satisfies these requirements.

When it passed the Dairy Act, Congress stated that it was in the government's interest to create a program to promote milk and dairy products. Congress found that "milk and dairy

products are basic foods that are a valuable part of human diet, . . . and the maintenance and expansion of existing markets for milk and dairy products are vital to . . . the general economy of the Nation." 7 U.S.C. § 4501(a); App. 49a. Thus, the government has a substantial interest in maintaining and expanding markets for milk and dairy products.

Moreover, at the time of Congressional consideration of the legislation that became the Dairy Act, the federal milk price support program had fulfilled its statutory goals, but also had caused milk production to significantly outpace demand, thereby forcing the government to purchase and store nearly 20 billion pounds of dairy surplus. App. 103a.

To reduce the amount of powdered milk, butter, and cheese the government was required to buy and store under the price support program, Congress passed the Dairy Act in 1983. The purpose of the Dairy Act was to stimulate demand for fluid milk and other dairy products and reduce the amount of dairy products the government was required to purchase and store. S. Rep. No. 98-163 at 18, 19; App. 93a.

The Dairy Act directly advances these substantial government interests. For example, as this Court has recognized, advertising creates and increases demand, which is necessary for maintaining and expanding markets. *See Lorillard Tobacco*, 533 U.S. at 557. "There is an immediate connection between advertising and [product] demand . . . ." *Central Hudson*, 477 U.S. at 569. The Ninth Circuit has also taken note of the clear link between dairy advertising and dairy demand. *Gallo I*, 185 F.3d at 977. That Court stated that "[t]he use of generic advertising of milk and milk products . . . accomplishes the Marketing Act's and Marketing Order's goal of maintaining the present market for, and creating new or larger markets for, California milk and milk products." *Id.* The same is true for the advertising conducted pursuant to the Dairy Act.

Also, the Dairy Act is no more extensive than necessary to serve that interest. To satisfy this *Central Hudson* requirement, there must be a reasonable fit between the means and ends and the means should be narrowly tailored to accomplish the goal. *Lorillard*, 533 U.S. at 557; *Florida Bar v. Went for It, Inc.*, 515 U.S. 618 (1995); *Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989). Just as the Third Circuit found that the Beef Promotion Act "infringes on the contributors' rights no more than necessary to achieve the stated goal," *Frame*, 885 F.2d at 1137, the Dairy Act is similarly well tailored to affect the rights of dairy producers no more than is necessary to achieve the Congressional objectives.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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